Filed 12/29/04 Zamora v. Castle Auto Sales CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

ELISA L. ZAMORA,

Plaintiff and Appellant,

v.

CASTLE AUTO SALES et al.,

Defendants and Respondents.

F044419

(Super. Ct. No. MCV16896)

OPINION

APPEAL from a judgment of the Superior Court of Madera County. David D. Minier, Judge.

The Law Office of Gerard A. Rose, Gerard A. Rose; The Dunnion Law Firm, Thomas J. Dunnion and Peter O'Harrow for Plaintiff and Appellant.

Brown & Peel and James W. Peel for Defendants and Respondents.

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This case requires us to consider the scope of a car dealer's duty to confirm a customer's competence to drive before entrusting a car to the customer for a test drive. Plaintiff Elisa Zamora was injured in an accident with defendants' customer. She appeals from a stipulated judgment entered after the trial court granted defendants' motion for summary adjudication on her claim of negligent entrustment. We agree with the trial

court's conclusion that defendants' motion showed an absence of triable issues of material fact regarding their alleged negligence and affirm the judgment.

FACTUAL AND PROCEDURAL HISTORIES

Defendant Billie Barton was an employee of defendant Castle Auto Sales, which was owned by defendant Francis Bell Woods. Patricia Behre came into the office at Castle and asked Barton if she could test drive a car on the lot. Behre was carrying a small dog.

Barton asked to see Behre's driver's license. Behre produced a temporary license issued by the State of Delaware. It bore an issue date of September 25, 2001, and stated that it was good for 60 days. The test drive took place on November 10, 2001. The license showed two addresses for Behre, one in Bethany Beach, Delaware, and one in Chowchilla, California. Behre later explained that she had lost her permanent Delaware license shortly before she was to move to California and gave both her old and new addresses when she applied for a temporary replacement. Barton gave Behre the keys to the car.

Taking the dog with her, Behre got in the car and drove onto Highway 152. She was traveling at 60 or 65 miles per hour when the dog fell from the front seat to the floor and began barking. Behre leaned over to pick the dog up and veered onto the right shoulder. She attempted to regain control, but instead veered back across the road into the oncoming lanes, striking plaintiff's car head on. Plaintiff sustained serious injuries.

Highway Patrol Officer Thomas Isler found Behre walking along the road with the dog after the accident. She had a minor head injury and bruises on her arms and legs. She told Isler she was walking to her husband's place of work, which was several miles away. The dog had defecated on Behre in the accident. Isler said he thought he smelled alcohol on Behre's "person," but in response to further questioning said, "[m]aybe it was the dog." He also performed a field sobriety test and believed it confirmed his opinion that Behre was under the influence of alcohol or drugs. A test of a breath sample taken

from Behre at the county jail shortly afterward, however, showed that she was not under the influence, and Isler concluded that his field test results were in error. It was subsequently learned that Behre's California driver's license had been suspended because of a Maryland conviction for driving under the influence. As a result, she was convicted of driving without a license and paid a fine.

Plaintiff sued Behre, Castle, Barton, and Woods. Against Castle, Barton and Woods, she alleged negligent entrustment of a motor vehicle. Castle, Barton and Woods moved for summary adjudication on that claim. The court granted the motion, and the parties stipulated to a judgment.

DISCUSSION

Plaintiff argues that the court erred in granting the motion for summary adjudication. We review an order granting summary adjudication under the same standard as an order granting summary judgment. (*Lindstrom v. Hertz Corp.* (2000) 81 Cal.App.4th 644, 648.) Our review is de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860.) We independently review the record and apply the same rules and standards as the trial court. (*Zavala v. Arce* (1997) 58 Cal.App.4th 915, 925.) The trial court must grant the motion if "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at pp. 850-851.)

In opposing defendants' motion, plaintiff contended that there were triable questions of fact related to four theories of negligent entrustment: 1) defendants failed to make inquiries that would have led to the discovery that Behre's California license had been suspended and that she was not entitled to use her Delaware license because she had lived permanently in California for more than 10 days; 2) defendants failed to recognize

that Behre was intoxicated or otherwise impaired; 3) defendants should not have allowed Behre to drive with a dog; and 4) defendants should not have allowed Behre to drive unaccompanied.

The evidence plaintiff produced in support of her opposition to the motion included a declaration of Janis McGuire, a car salesperson whom plaintiff claimed was an expert on procedures for allowing test drives. Plaintiff's evidence also included deposition testimony of Officer Isler. The court sustained defendants' objections to McGuire's declaration and to opinion testimony in Isler's deposition.

On appeal, plaintiff argues that the two evidentiary rulings were erroneous. She contends that this and other evidence she submitted raises triable issues of fact with respect to each of the four theories of negligent entrustment set forth above.

I. Evidentiary rulings

We address the evidentiary rulings first. Janis McGuire's declaration stated that "certain safety precautions" pertaining to test drives are "generally accepted within the car and truck sales industry" and are followed by "most sellers of new and used automobiles and trucks …." Where a customer presents an out-of-state driver's license, these purported practices include making a series of inquiries regarding "the circumstances of the driver's presence in the State of California," whether the customer has ever had a California license and, if so, whether it has ever been suspended. The alleged practices also call for salespersons to "assess" customers and determine whether they appear to be "'burned out' or 'sick …'" "Any indication of impairment in the ability to safely operate a motor vehicle, even a slight impairment," should result in refusal to allow a test drive. Further, according to McGuire, "[a]llowing a dog to accompany a test driver, particularly when the dog is untethered," violates these generally accepted practices, as does "allow[ing] a test driver to go out on the road unaccompanied by the sales person." McGuire opined that the practices she described "help assure the safety of customers and sales people alike," and that failure to follow

them "is negligent" and "falls below the applicable standard of care." The only foundation stated in the declaration for these assertions, and the only proffered basis of McGuire's expertise, was that McGuire worked as a salesperson at a car and truck dealership "[b]eginning in July 1992, and continuing until November 2000 …."

We hold that the court did not err in excluding this declaration. We review evidentiary rulings the court makes in the summary adjudication context for abuse of discretion. (*People v. Martinez* (1998) 62 Cal.App.4th 1454, 1459; *Jackson v. Deft, Inc.* (1990) 223 Cal.App.3d 1305, 1319-1320.) An expert's opinion must be "[b]ased on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him …." (Evid. Code, § 801, subd. (b).) McGuire's declaration stated only that she worked at one dealership for a period of time. Here, the trial court ruled that McGuire was not qualified to give the opinions contained in her declaration. The court did not abuse its discretion in concluding that McGuire's experience was not a sufficient basis for her claim that "most sellers of new and used automobiles and trucks" follow the practices she described or her opinion that the alleged practices are required under the applicable standard of care.

The court also did not abuse its discretion when it sustained defendants' objection to opinions in Officer Isler's deposition testimony. Isler testified partly as a percipient witness and partly as an expert. Speaking as a percipient witness, he stated that he talked with Behre for about 45 minutes after the accident. He said, "[A]t the time I think I smelled a whiff of an alcoholic beverage on her—on her person." But on cross-examination he retracted this assertion and admitted he did not know what the smell was. "Maybe it was the dog. I don't know." Isler testified that he performed a field sobriety test involving a nystagmus (i.e., eye movement) test, a balancing test, and a field breath test. Behre's performance was normal on the nystagmus and balancing tests. Isler wrote in his report that the field breath test showed a blood alcohol level of .04, but he testified that this was an error and that he meant to write .004. (This is 1/20th of the DUI

threshold concentration, .08 [Veh. Code, § 23152].) Behre explained that she had taken NyQuil or DayQuil that morning. A test done at the county jail shortly afterward on "a more sophisticated piece of equipment" showed that Behre's blood alcohol level was zero. A test for drugs done at the same time was also negative.

As an expert, Isler testified that Behre had used drugs "enough over time that it's dilapidated her senses and … they are not up to the level of a normal person." "I've seen this over and over again," he went on. "[A]s time goes on, if you constantly abuse your body, just like alcoholics will burn out their liver, it also affects—and I see it because I have actually evaluated people and see the physical abilities when it comes to driving. Their ability just to handle a motor vehicle, their perception, their depth perception, even their view of reality just becomes corroded and that can all affect someone's driving ability." Isler admitted he knew nothing about Behre before the accident and had no training in toxicology or as a doctor, and there is no evidence that Isler investigated Behre's history in any way after the accident, other than by informally interviewing her. Nevertheless, he insisted he was qualified to opine that Behre became impaired though chronic drug abuse on the basis of his "20 years of experience" as a police officer and his 45-minute discussion with Behre. Among the factors he considered in formulating his opinion were that Behre was "not really married to the guy" she referred to as her husband; that she left the state and came back; that she took Prozac for depression; that she had a prior conviction for driving under the influence; and that she said she took NyQuil even though he thought she did not seem sick.

Defendants objected to Isler's opinion testimony. The court sustained the objection "with regard to the history of drug abuse … because, clearly, he didn't qualify as an expert to give that opinion."

The court's ruling was correct. It is apparent from Isler's testimony that his opinions about Behre's drug or alcohol abuse, the state of her "senses," and her ability to drive were speculative.

II. Summary adjudication

The evidence in the record raises no triable issues of fact under any of the four theories of negligent entrustment plaintiff advances. The court's ruling on the motion for summary adjudication was correct.

Plaintiff's first theory is that defendants were negligent because they failed to make inquiries that would have led to the discovery that Behre's California license had been suspended or that she was not entitled to use her Delaware license because she had lived permanently in California for more than 10 days. This theory is based on the rule that an owner is negligent if he or she entrusts a vehicle to a person he or she knows or should know is unlicensed. (Veh. Code, § 14606, subd. (a); *Johnson v. Casetta* (1961) 197 Cal.App.2d 272, 274; *Owens v. Carmichael's U-Drive Autos, Inc.* (1931) 116 Cal.App. 348, 352.)

There is no genuine dispute that Behre's license was facially valid. It bore the driver's name, signature, address, and date of birth, and its stated expiration date had not passed. Officer Isler testified that he ran a computer check on it and found it to be a validly issued and current Delaware license.

Even assuming there is a genuine factual dispute here about whether Behre was legally entitled to drive in California, there is no authority for the view that after she presented a facially valid license defendants were obligated to make inquiries that would have led them to discover a suspension or facts about her residency that affected her driving privilege. To the contrary, where a prospective driver presents a license that appears valid on its face, a vehicle owner has no duty to undertake an investigation of the driver's history. In *Osborn v. Hertz Corp.* (1988) 205 Cal.App.3d 703, the driver presented a valid license to a rental car company. The company rented a car to him, and he proceeded to get drunk and cause an accident. (*Id.* at p. 706.) The plaintiff argued that the rental company was obligated to make inquiries about the driver's driving record. If it had done so, it would have learned that the driver had twice been convicted of drunk

driving several years earlier and suffered a six-month license suspension as a result. (*Ibid.*) The court held that the failure to make these inquiries was not negligent as a matter of law. (*Id.* at p. 710.)

The facts in *Hartford Accident & Indemnity Co. v. Abdullah* (1979) 94 Cal.App.3d 81 are representative of the kinds of situations in which a car dealer is negligent in failing to learn that a test driver is unlicensed. In that case, the dealer did not even ask to see the driver's license, even though the dealer knew the driver had been arrested days before on outstanding traffic warrants. The driver had no license and got in an accident. (*Id.* at p. 93.) The Court of Appeal reversed a declaratory judgment in favor of the dealer. (*Id.* at p. 94.) "Those persons who cannot produce a valid license to operate … automobiles test drive at the dealer's peril." (*Id.* at p. 92.)

Here, the driver did produce a facially valid license, and the dealer had no actual knowledge of facts that would reasonably prompt it to investigate. In the absence of a general duty to investigate a prospective test driver's history, the dealer was not negligent as a matter of law in failing to discover that the driver's California license was suspended or that she had lived in California too long to rely on her Delaware license.

Plaintiff's second theory is that defendants negligently failed to recognize that Behre was intoxicated or otherwise impaired. This theory is based on the settled rule that negligent entrustment liability exists where the lending owner "know[s], or from facts known to him should know, that the entrustee driver was intoxicated, incompetent, or reckless." (*Hartford Accident & Indemnity Co. v. Abdullah, supra*, 94 Cal.App.3d at p. 91.)

We conclude that the evidence properly before the court did not give rise to a triable issue of material fact regarding whether Behre was intoxicated or otherwise impaired. Behre testified that she was not intoxicated, and Barton testified that she detected no signs of intoxication in Behre. Officer Isler essentially admitted that he had no reason to think Behre was intoxicated or impaired at the time of the accident. He

conceded that he did not know what the odor he smelled was, that his field sobriety test was negative, and that the alcohol and drug tests conducted at the county jail were negative. Isler did testify that although Behre had just been involved in a "pretty traumatic accident," she was "[m]ore confused than I would expect" based on her "pretty minor" injuries. He also testified that Behre told him she had "mental problems" and suffered from a "bipolar personality." But this testimony does not support the proposition that Barton should have recognized or inquired about any impairment before allowing Behre to drive. Isler's speculation about how confused Behre should have been after the accident and Behre's alleged comments to him about her mental health have no bearing on whether a reasonable person would have perceived Behre as impaired before the test drive. As a matter of law, defendants were not negligent in failing to detect intoxication or impairment of which there was no evidence.

The third theory of negligent entrustment plaintiff advances is that defendants should not have permitted Behre to drive with an "untethered" dog in the car, "particularly when the sales person has no information about the dog …." Plaintiff does not argue that driving with a dog in a car—tethered or not, and with or without information about the dog—is negligent in general, and there is no authority for the view that it is. Further, there is no evidence that this particular dog displayed any signs that it would be an unusually difficult dog with which to drive. We do not see how the entrusting owner can be liable for negligence for allowing Behre to drive with the dog if there was no reason to think it was negligent for Behre to drive with it. Behre might, of course, have been negligent when she picked the dog up off the floor, but there is no contention that defendants "allowed" her to do that. We conclude that there is no triable issue of material fact under this theory.

Plaintiff's last theory is that defendants were negligent in failing to accompany the driver to whom they entrusted their car. This position is meritless. We think it obvious that "ordinary care and skill" (Civ. Code, § 1714) do not require owners to ride along

whenever they lend their vehicles. The fact that the lending took place in a commercial setting in which the lender and borrower did not previously know each other makes no difference. To hold otherwise would essentially outlaw the car rental business.

DISPOSITION

The judgment is affirmed. Costs are awarded to defendants.

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Wiseman, J.

WE CONCUR:

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Dibiaso, Acting P.J.

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Buckley, J.